Nos. 91-790 and 91-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner,
v.
LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,
v.
CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONER IN NO. 91-790 AND CROSS-RESPONDENT IN NO. 91-1206

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QUESTIONS PRESENTED

1. Whether a claim under state tort law that the traffic control devices at a railroad crossing were inadequate is pre-empted by the Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.* (FRSA), because the devices were selected by the state pursuant to mandatory federal standards and could not have been changed by the railroad on its own initiative.

2. Whether a claim under state tort law that a train going between 32 and 45 miles per hour exceeded the maximum reasonable speed is pre-empted under FRSA because the allowable speed of 60 miles per hour is set by regulation adopted by the Secretary of Transportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 933 F.2d 1548. The opinion of the district court (Pet. App. 23a-28a) is reported at 742 F. Supp. 676.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1991. Rehearing was denied on August 20, 1991. The petition for certiorari was filed on November 15, 1991, the cross-petition was filed on December 16, 1991,

and both were granted on June 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution provides in Article VI, Clause 2:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land;

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. § 421, provides:

> The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents . . .

Section 202 of the Federal Railroad Safety Act, 45 U.S.C. § 431, provides:

> The Secretary of Transportation . . . shall prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . .

Section 204(b) of the Federal Railroad Safety Act, 45 U.S.C. § 433(b), provides:

> In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem . . .

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement . . . .

STATEMENT OF THE CASE

Petitioner and cross-respondent CSX Transportation, Inc. (CSXT or petitioner), a wholly owned subsidiary of CSX, is a rail carrier. It operates a rail system comprising approximately 19,000 miles of trackage located in 20 states, the District of Columbia and the Province of Ontario, Canada.

Respondent and cross-petitioner Lizzie Beatrice Easterwood (respondent) is the widow of Thomas Easterwood. On the morning of February 24, 1988, Mr. Easterwood was killed when his truck was struck by a CSXT train at the Cook Street grade crossing in Cartersville, Georgia. Respondent then brought suit against CSXT for wrongful death. The issue before this Court is whether Congress has pre-empted state tort claims when, as here, they are based on allegations of railroad negligence in selecting traffic control devices for grade crossings and in traveling at an unreasonably high speed.

1. History and Common Law of Grade Crossings.

This case arises out of the danger that exists inherently wherever highways and railroads intersect. These crossings are particularly hazardous because, unlike a car, a train traveling at normal speed cannot be stopped within the distance allowed after the operator of the train sees an obstruction on the tracks. The train also cannot swerve to avoid a collision. Finally, use of emergency brakes creates a substantial risk of derailment, which can cause serious injury to passengers and crew and, if the train is carrying hazardous materials, can even harm those in the area of the accident. See U.S. DOT, Rail-Highway Crossings Study 5-10 (1989) ("DOT Study"); U.S. DOT, Railroad-Highway Grade Crossing Handbook 44 (2d ed. 1986) ("DOT Handbook"); Hearing on Railroad Safety Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. 10 (1985) (Statement of John Riley, Administrator of the FRA).

The reason why these potentially dangerous crossings exist and are so numerous is a function of the history of the railroads and highways and the settlement and growth of our nation. The completion of railroads across the country in the middle of the nineteenth century opened the West to growth and development and led to the settling of towns. As the populations within each community grew and the availability of commerce between towns expanded, the need for and use of roads grew. At first, the roads, which accommodated pedestrians and horse-drawn vehicles, were not developed to avoid railroad crossings; instead, they were built right across the tracks. That approach was more convenient and less expensive. It was also more dangerous, and the danger increased as highway and rail traffic increased during the latter half of the nineteenth century. With the advent of the automobile in the early part of this century, the danger became acute. See DOT Study 1-4 to 1-5; DOT Handbook 1-4, 15.

The initial response of the common law was to impose primary responsibility on the railroads for ensuring safety at grade crossings. See *Continental Improvement Co.* v. *Stead*, 95 U.S. 161 (1877). The railroads bore the duty in the operation of trains and in the maintenance of highway crossings to exercise reasonable care to avoid injury to persons crossing or traveling along the railroad. *Grand Trunk Ry.* v. *Ives*, 144 U.S. 408, 416-20 (1892); *Illinois Cent. R.R.* v. *Farris*, 259 F.2d 445, 447-48 (5th Cir. 1958). A railroad also could be required to bear a portion of the costs of any public improvements made to further safety. *Lehigh Valley R.R.* v. *Board of Pub. Utils. Comm'rs*, 278 U.S. 24, 34-35 (1928); *Atlantic Coast Line R.R.* v. *City of Goldsboro*, 232 U.S. 548, 559-60 (1914). Travelers injured as a consequence of the railroads' negligence in carrying out these duties could seek damages through common law tort suits.

With the development and increasing use of automobiles and other motor vehicles, however, it became clear that railroads were not uniquely or even well suited to

protect highway travelers. While train traffic remained relatively constant, the speed and volume of highway traffic increased dramatically. It was the highway traffic, over which the railroad had no control, that made crossings more dangerous. This Court observed that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935).

2. Development of Federal Railroad Safety Legislation.

a. Over time, states and eventually the federal government responded to the increased danger at grade crossings with a more comprehensive response than railroads alone could provide. Recognizing that the primary answer lay in controlling traffic moving onto the tracks, Congress initially addressed the grade crossing problem through federal highway legislation.[1] In 1944, Congress provided the states with federal funds designated "for the elimination of hazards of railway-highway crossings." Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 838 (codified as amended at 23 U.S.C. § 130(a)). To allocate the cost of such projects Congress required the Secretary to determine "the net benefit to the railroad" of any projects to improve the safety of grade crossings, and to charge the railroad for its share of the cost of the project, "in no case [to] exceed 10 per centum." 23 U.S.C. § 130(b), (c).[2]

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[1] Congress first provided states with general purpose highway funds that could be and were used to fund grade crossing improvements in the Federal Highway Act (ch. 241, 39 Stat. 535 (1916)). The National Industrial Recovery Act of 1933 (ch. 90, 48 Stat. 195) and Hayden-Cartwright Act (§ 8, ch. 582, 49 Stat. 1519 (1936)) were the first two federal laws in which Congress specifically earmarked federal funds for improving grade crossing safety. *See generally* DOT Study at 1-7; DOT Handbook at 8-9.

[2] The Secretary subsequently concluded that the net benefit of grade crossing improvement to the railroads was zero. 23 C.F.R. § 646.210(b)(4)-(4). *See infra*, pp. 33-34.

Despite "continuing efforts to improve" safety, accidents at grade crossings "increased rather sharply" between 1960-67. DOT Study 1-5. Realizing that merely providing federal funds to supplement state and private efforts had not succeeded in reducing grade-crossing accidents, the Secretary of Transportation called on representatives of the railroad industry, railroad labor organizations and state regulatory commissions to form a task force in 1969 to analyze the problem and recommend solutions. See Report of the Task Force on Railroad Safety ("Task Force Report"), included as Appendix F to H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 USCCAN 4104, 4125 ("House Report"). At the same time, "grade-crossing accidents rank[ed] as the major cause of fatalities in railroad operations." *Id.* at 4126. These accidents were of particular "public concern" because of "[t]he need for transporting ever-increasing quantities and varieties of hazardous materials." *Id.* at 4127. The Task Force concluded that "[r]ailroad safety is wide in scope and requires a more comprehensive national approach." *Id.* It recommended that the "Secretary of Transportation" be given the "authority to promulgate reasonable and necessary rules and regulations establishing safety standards in all areas of railroad safety," and that "[e]xisting State rail safety statutes and regulations remain in force until and unless preempted by Federal regulation." *Id.* at 4129, 4130.[3]

b. Congress responded by enacting the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. § 421 *et seq.* The first section of FRSA declares that Congress's purpose is "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. § 421. To achieve that end, as the Task Force had recommended, Congress vested authority in "[t]he Secretary of Transportation . . . [to] prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." *Id.* at § 431. In order to achieve the national uniformity essential to make the Secretary's regulatory efforts effective, Congress also provided that all state law addressing a particular aspect of rail safety would be pre-empted once the Secretary had adopted a rule or standard covering that subject matter. Employing sweeping pre-emptive language, Congress declared:

> that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

Id. at § 434.[4] In taking this action, Congress made clear its view that safety would not be promoted "by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." House Report at 4109.

Although FRSA provided the Secretary with authority to regulate all areas of rail safety, Congress emphasized the importance of having the Secretary promptly and specifically review the safety of railroad grade crossings. Congress required the Secretary to prepare and submit

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[3] *See also Prevention of Rail-Highway Grade Crossing Accidents Including Railway Trains and Motor Vehicles*, 322 I.C.C. 1, 82 (1964) (concluding, after extensive hearings, that "[i]n the past it was the railroad's responsibility for protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal").

[4] Congress did allow the states to "adopt or continue in force an additional or more stringent law, [etc.]" that is "necessary to eliminate or reduce an essentially local safety hazard," so long as the state rule is not incompatible with federal law and does not otherwise "creat[e] an undue burden on interstate commerce." 45 U.S.C. § 434. *See infra*, p. 47, n.21.

within one year of the enactment of FRSA "a comprehensive study of the problem of eliminating and protecting railroad grade crossings . . . together with his recommendations for appropriate action." 45 U.S.C. § 433(a). Congress also directed the Secretary to use all available statutory authority, including but not limited to the authority provided by FRSA, to address the grade crossing problem:

> In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem . . . .

Id. at 433(b).[5]

In response, the Secretary submitted a comprehensive two-part report on the history, scope, causes of, and potential solutions to the problem of railroad-highway safety. U.S. DOT, Report to Congress: Railroad-Highway Safety, Part 1: A Comprehensive Statement of the Problem (1971), Part II: Recommendations for Resolving the Problem (1972) ("DOT Report"). In this report, the Secretary noted that grade crossings were "the only location along the highway where the highway authorities do not have total responsibility for and control over the installation, operation and maintenance of traffic control devices." DOT Report Part II at 33. The Secretary accordingly recommended "national coordination" of the currently "fragmented approach" to safety problems at grade crossings. DOT Report Part I at iii, Part II at 34.

Congress responded to the Secretary's Report with additional legislation designed to facilitate the Secretary's

[5] Several months later, Congress enacted the Highway Safety Act of 1970, Pub. L. No. 91-605, 84 Stat. 1739, which also required the Secretary to "conduct a full and complete investigation and study" of rail-highway crossing safety. *Id.* at 205 (formerly codified at 23 U.S.C. § 322(e)).

ability to address railway-highway safety. In the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, Congress initiated special funding for a program to eliminate hazards at railroad-highway crossings. *Id.* at Section 203 (codified as amended at 23 U.S.C. § 130). Congress required each State to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* at 203(a). Each state was required to report annually to the Secretary on the costs and the effect on accidents of its rail-highway crossings program. *Id.* at 203(e).[6]

3. Federal Regulation of Grade Crossings and Train Speed.

a. Pursuant to this legislation, and after careful study, the Secretary has comprehensively regulated the role of traffic control devices in ensuring public safety at grade crossings. See generally 23 C.F.R. Parts 630, 646, 655, 924, 1204.4. Having determined that it would be impracticable for the Secretary directly to select the appropriate traffic control devices at each of the more

[6] Since 1973, Congress has continued to strengthen federal support for improving crossing safety. For example, in 1978 Congress passed the Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, which appropriated over $500 million to state transportation agencies to install automatic traffic control devices, (§ 203(a)), and expanded the program to include all crossings on "any public road." § 203(b). The more recent Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, repealed the Federal Highway Safety Act of 1973, but replaced it with substantially similar language and mandated an updated study of grade crossing safety. *See* Pub. L. No. 100-17, 101 Stat. 132, 159, § 121 (codified at 23 U.S.C. § 130); 23 U.S.C. § 130 note.

In 1988, Congress amended FRSA to require the Secretary to promulgate "such rules, regulations, orders, and standards as may be necessary to ensure the safe maintenance, inspection, and testing of signal systems and devices at railroad highway grade crossings. 45 U.S.C. § 431(q), added by the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 624, 639.

than 170,000 public grade crossings nationwide, the Secretary developed a nationally coordinated "Grade Crossing Program" that involves state and local transportation authorities. The Secretary's regulations require each state to "develop and implement . . . a highway safety improvement . . . program" that "shall incorporate . . . a process for establishing priorities for implementing highway safety improvement, considering . . . the relative hazard of public railroad-highway grade crossings based on a hazard index formula." 23 C.F.R. §§ 924.5, 924.9(a)(4)(iii). To assist States in the task of surveying crossings and setting priorities, the Secretary, working with states and railroads, developed a national inventory of all grade crossings. See DOT Study 1-19. The Secretary then developed a Hazard Index Formula for states to use in ranking the danger posed by each crossing. DOT Handbook 63-79. Each state is then required to "develop appropriate countermeasures" for the hazards at its "railroad grade crossings. 23 C.F.R. § 1204.4 No. 13.D.5.

The Secretary's efforts have eliminated much of the age-old problem of overlapping and conflicting responsibility for grade-crossing protection. The Secretary's mandated Highway Safety Improvement Program (23 C.F.R. Part 924) and associated regulations make clear that the responsibility for "[t]he determination of need and selection of devices at a grade crossing" lies squarely with local and state authorities. U.S. DOT, Manual for Uniform Traffic Control Devices 8A-1 (1988) ("MUTCD") (adopted as law at 23 C.F.R. §§ 646.214(b)(1), 655.601, 655.603(a)); see also MUTCD at 8D-1 ("selection of . . . devices . . . is determined by the public agencies having jurisdiction[]"). The Secretary has further required state approval for any proposed traffic control device (MUTCD 8D-1), and has foreclosed the assessment of any portion of the cost of selecting and installing new traffic control devices against the railroad. 23 C.F.R. § 646.210(b)(1).

Furthermore, the Secretary has even regulated the narrow subissue of when an automatic gate with flashing signals is required. In 23 C.F.R. § 646.214(b)(3), the

Secretary has identified six "conditions" which mandate the use of a warning gate unless a "diagnostic team" justifies a departure from the regulations. *Id.*

b. The Secretary also has comprehensively regulated the subject of train speeds. The regulations set forth a maximum allowable operating speed for each of six categories of track. 49 C.F.R. §§ 201.4, 213 & App. A. The maximum speeds are designed to minimize the possibility that the train will derail and to promote efficient rail service with due regard for grade crossing safety.

The Secretary has specifically addressed the impact on public safety of the speed of a train at a grade crossing. Although the issues of train speed and grade crossing protections come to the Court separately as legal questions, they are integrally related safety issues, and the Secretary has treated them as such. Under the Secretary's regulations, train speed is a significant consideration in deciding what type of traffic control devices should be installed at a grade crossing. 23 C.F.R. § 646.214(b)(3)(i). For example, "where trains operate at speeds of 20 mph or higher," the Secretary requires that "circuits controlling automatic flashing light signals shall provide for a minimum operation of 20 seconds before arrival of any train on such track." MUTCD 8C-7.

These regulations reflect the Secretary's realization that the best way to improve safety at grade crossings is not to attempt to tailor train speeds. As discussed above, even at relatively slow speeds, trains can neither stop in time nor swerve to avoid a collision. The Secretary has therefore restricted train speeds to prudent maximums given the need to protect against the safety problem of derailment, and then regulated the nature of traffic control devices to ensure that highway traffic will receive adequate warning of the train's approach at any speed within the overall limits. The Secretary's comprehensive standards thus regulate both train speed and highway crossing devices in a manner designed to

ensure that every highway-railroad crossing is reasonably safe.

4. Status and Results.

As of 1990, there were 176,572 public grade crossings, which constitute slightly more than half of all grade crossings. U.S. DOT, Rail-Highway Crossing Accident/Incident and Inventory Bulletin No. 13—Calendar Year 1990, at 45 (July 1991) ("DOT Crossing Inventory"). Fifteen percent of these crossings had an automatic gate, and an additional 21 percent had another type of active warning device (flashing lights and/or other special devices). *Id.* at 51. Most of the remaining public crossings (59 percent) had a cross-buck or other "passive" warning sign. *Id.* See generally DOT Study 4, 2-6.

The Secretary's integrated approach to improving grade crossing safety has been extraordinarily effective. Since the start of the Rail-Highway Crossings program in 1974, the federal government has spent more than $2.4 billion to support over 26,000 projects to improve safety at grade crossings. Report of the Secretary of Transportation to the United States Congress, The 1992 Annual Report on Highway Safety Improvement Programs, at S-2 (April 1992) ("1992 Annual Report"). These projects, together with the Secretary's regulations, have reduced the rate of fatal injuries at grade crossings by 88 percent since 1974. *Id.*; see also *id.* at IV-5. Non-fatal injuries have been reduced by 60 percent. *Id.* By contrast, "[i]n the 9 years between 1958 and 1967 the casualty ratio remained almost constant." DOT Report Part I at 16. Accordingly, the Secretary has estimated that "the program has prevented over 6,800 fatalities and 28.500 nonfatal injuries since 1974." 1992 Annual Report at S-2, IV-5.

5. Proceedings and Decisions Below.

On June 3, 1988, respondent filed a diversity action against CSXT for wrongful death in the United States District Court for the Northern District of Georgia. Respondent alleged that CSXT negligently failed to install

an automatic gate at the crossing and that CSXT's train crew had operated the train at an unreasonably high speed.[7] It is undisputed that the active warning devices at the Cook Street crossing included two flashing lights suspended on a pole on the shoulder of Cook Street, two additional flashing lights suspended directly over the street by a cantilevered boom, and two more lights placed on a separate signal mast; the passive warnings included two railroad crossbuck signs, an advance railroad warning sign, and a large "RxR" pavement marking.

After discovery, CSXT moved for summary judgment on the ground that these tort claims were pre-empted by Section 434 of FRSA, 45 U.S.C. § 434. In support of its motion, CSXT submitted several affidavits. One was from a motorist who stated that she was directly behind Mr. Easterwood, saw the warning lights, heard the bells and the train approaching, and watched Mr. Easterwood's truck drive through the lights and onto the track. J.A. 12-14.

Another was from Wendall A. Hester, Manager of the Railroad-Highway Grade Crossing Section of the Georgia Department of Transportation ("GDOT"). *Id.* at 15-17. Pursuant to Georgia's federally mandated State Highway Improvement Program, Mr. Hester's Section had the responsibility for "inspection and evaluation of grade-crossings on a state-wide basis, and [for] the preparation of Diagnostic and Engineering Inspection Reports for each crossing inspected." *Id.* at 16.

In his affidavit, Mr. Hester explained that the Cook Street crossing was one of five grade crossings in Cartersville that his Section reviewed in the late 1970's and

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[7] Respondent made several other allegations of negligence, none of which is before this Court at this time and some of which should be available to respondent on remand. *See* Pet. 3; Cross-Pet. 11. The persistence of some common law claims reflects the narrow scope of the pre-emption ruling that petitioner seeks. *See infra* pp. 21-22.

early 1980's. *Id.* The Section initially planned to install a new "combination flashing light and gate assembly" at the West Avenue grade crossing. *Id.* Because the train-detection circuitry needed for that new device was incompatible with the circuitry in place at the four nearby crossings, including Cook Street, the Section decided to "upgrade the flashing light signals and circuitry at these crossings" as well. *Id.* By December, 1981, the "new circuitry and the combination flashing light gate assembly" were installed at all but the Cook Street crossing. *Id.* State and federal funds paid for the installation. *Id.*

"Plans for upgrading the crossing signals at Cook Street were drawn up at the same time" as for the other crossings. *Id.* at 16-17. But Cook Street is wider than the streets at the other crossings and "because of the large crossing width, gates could not be designed to cover the crossing without constructing a traffic island in the street." *Id.* at 17. Construction of a traffic island, in turn, required City approval because Cook Street is a city street. *Id.* The Section submitted its proposal to the City of Cartersville, which "rejected the plan as being too restrictive to the large volume of trucks using the crossing." *Id.* As a result, at Cook Street only the circuitry for the "motion detector" was upgraded "to insure frequency compatibility with the automatic detection devices installed at the adjacent West Avenue crossing." *Id.*

After oral argument, the district court granted CSXT's motion for summary judgment. Applying FRSA's express pre-emption provision, the district court held that respondent's claim of negligence "in failing to install gate arms" is pre-empted. Pet. App. at 26a. The court found that the GDOT had evaluated the Cook Street crossing, had initially determined that gate arms "should be installed," but later "transferred the funds to other projects and removed the Cook Street crossing from the list

of crossings to receive gate arms." *Id.* Because the GDOT had acted "pursuant to federally delegated authority" in determining the appropriate traffic control devices for Cook Street, the court held that any common law duty on the railroad to duplicate that review was pre-empted. *Id.*

The district court also held that "the pervasive nature of federal regulation" of train speed pre-empted respondent's negligence claim on that ground. *Id.* at 25a-26a. The court specifically found that "[t]he track in question is classified [by the Secretary] as class four track and, according to federal regulations, the maximum train speed for class four track is 60 miles per hour." *Id.* at 25a. The court then found that "there is no evidence that the train exceeded this federal standard," [8] and thus no basis for any state law negligence claim "based on the train's speed." *Id.* at 26a.

The court of appeals affirmed the district court's ruling with respect to train speed. *Id.* at 7a-9a. On the question of responsibility for selecting appropriate traffic control devices, however, the court of appeals reversed. The court held that the Secretary's regulations governing railroad-highway grade crossings did not trigger pre-emption under Section 434 of FRSA because they were "not promulgated . . . under his general power to regulate railroad safety." *Id.* at 10a. In the alternative, the court ruled that even if Section 434 were applicable, the decision of the GDOT not to follow through on the initial recommendation to install a gate constituted "a policymaker's failure to act [that] is insufficient to constitute pre-emption." *Id.* at 12a (distinguishing *Marshall* v. *Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983)). Finally, the court declined to infer pre-emption from federal highway legislation alone. *Id.* at 11a.

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[8] The engineer testified that the train was traveling at 32 m.p.h. J.A. 21-22; respondent's expert estimated train speed at between 38 and 45 m.p.h. *Id.* at 26-27.

SUMMARY OF ARGUMENT

Under well-established standards for pre-emption under the Supremacy Clause, state law is invalid if it relates to a subject matter that Congress has reserved exclusively for federal regulation or if state law and federal law conflict because state law stands as an obstacle to the achievement of Congress's objectives. *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Respondent's tort claims are barred by principles of both express statutory pre-emption and conflict pre-emption.

I.

In enacting FRSA, Congress sought to make the law "relating to railroad safety . . . nationally uniform to the extent practicable." 45 U.S.C. § 434. To that end, Congress ordered the Secretary of Transportation to use his authority over both railroad and highway safety to promulgate national standards to improve rail safety, and in particular to "implemen[t] solutions to the grade crossing problem." 45 U.S.C. § 433(b). Congress then expressly provided that state law must give way as soon as the Secretary adopts "a rule, regulation, order or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. Because Section 434 broadly pre-empts "any law . . . relating to railroad safety" whose subject matter is covered by any federal standard, the statute expressly pre-empts duties imposed under state common law. *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) (plurality op.); *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163-64 (1991).

Respondent's first claim is that CSXT negligently failed to select an appropriate traffic control device—an automatic gate—for the Cook Street crossing. This claim, if allowed to stand, would impose upon CSXT a state law duty to evaluate, select, install, and pay for appropriate traffic control devices at grade crossings. That duty is pre-empted under the plain language of Section

434 by the Secretary's promulgation of comprehensive regulations and standards that cover this subject matter.

A.

The federal government now administers, funds, and supervises a prospective-looking regulatory scheme that places responsibility upon state and local transportation authorities, and not upon railroads, to evaluate safety at grade-crossings, to set priorities for improvements, and to select and pay for the installation of appropriate traffic-control devices. 23 C.F.R. Parts 630, 646, 924, 1204.4. The Secretary declares that "[t]he determination of need and selection of devices at a grade crossing is made *by the public agency* with jurisdictional authority," and that no device may be installed without state approval. MUTCD 8A-1, 8D-1 (emphasis added). Moreover, public agencies must provide "an automatic gate" at any public crossing that meets one or more of the criteria set forth by the Secretary. 23 C.F.R. § 646.214(b)(3). States, which receive substantial federal funding for grade-crossing improvements, may not assess any of these costs to railroads. *Id.* at § 646.210.

This comprehensive regulatory scheme "covers the subject matter" of evaluating the need for, selecting, and paying for traffic control devices at grade crossings by assigning that duty to public authorities. The common law duty that respondent seeks to enforce not only relates to the subject matter of these regulations—it would assign to railroads the very same duties that federal law assigns to public agencies. It is therefore pre-empted by the plain terms of Section 434.

The court of appeals' contrary conclusion is both factually and legally erroneous. The Secretary's grade-crossing regulations were adopted pursuant to his authority under FRSA as well as under federal highway legislation. 49 C.F.R. § 1.48(o); 23 C.F.R. § 646.202. Furthermore, pre-emption under Section 434 is triggered by any regulation

adopted by the Secretary, no matter what the source of his authority. 45 U.S.C. §§ 433(b), 434.

B.

Even apart from Section 434, respondent's negligence claim is pre-empted under the basic standards of conflict pre-emption. The duty respondent seeks to impose upon the railroads is precisely the same duty that the Secretary has placed on public authorities. "The inevitable result" of perpetuating this common law duty "would be that . . . States could do indirectly what they could not do directly"—require railroads to pay for improvements in traffic control devices. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 495 (1987). At bottom, allowing imposition of this state law duty frustrates Congress's express goal of replacing the prior system of retrospective, *ad hoc* "enforcement by 50 different judicial and administrative systems" (House Report at 4109) with a nationally coordinated, uniform approach that carefully directs limited resources toward the highest priority crossings.

This case graphically illustrates the conflict. The decision not to install a gate was made by the City of Cartersville to promote *highway* safety and convenience. For that reason the State Department of Transportation chose to protect that crossing by upgrading the signals, and not by installing a gate. Once the State chose the proper devices to protect both highway and rail safety, CSXT had no responsibility to install a gate at that crossing and, indeed, could not have done so on its own initiative. Judicial imposition of a common law duty to take action where federal law imposes a regulatory bar is the archetypal situation where state law is pre-empted. See *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

II.

Respondent's second claim, which is intertwined with the first claim concerning the need for a crossing gate, is that CSXT's engineers negligently operated the train at

an excessive speed in traveling through the Cook Street crossing. It is undisputed that petitioner's train was traveling well within expressly stated federal speed limits. The question, therefore, is whether respondent may seek to enforce a common law duty to travel through grade crossings at what a jury, years later, declares to be the "reasonable" speed that is slower than the federal maximum.

A.

The Secretary has expressly covered the subject matter of what train speeds are proper at grade crossings. The Secretary's regulations comprehensively address all aspects of train speed. 49 C.F.R. Parts 201, 213, 218. The Secretary has decided what speeds are appropriate on all tracks and set the limit at Cook Street at 60 miles per hour. In dealing with train speeds and grade crossings as an integrated subject, the Secretary has chosen to address the particular problem of train speed at grade crossings by regulating the nature, timing and placement of traffic control devices to ensure that motorists are given adequate warning of the train's approach at any speed within the maximum set by federal law. 23 C.F.R. § 646.214(b); MUTCD 8C-5. A common law duty to travel at a slower, "reasonable" speed unquestionably relates to the subject matter regulated by the Secretary and therefore is pre-empted under Section 434.

B.

Respondent's claim also conflicts with the achievement of Congress's purposes in enacting FRSA. The Secretary's regulations reflect the judgment that keeping highway traffic off the tracks through effective warning signals is the best way to prevent collisions. Because of the inherent differences between motor vehicles and trains, slower train speeds are at best ineffective in improving grade-crossing safety and indeed can increase the risk of accidents. Respondent's attempt through state law to prevent accidents by reducing speeds conflicts with the federal system and therefore is pre-empted.

ARGUMENT

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, state laws that "interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution" are invalid. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 92 (1824). The basic standards of this doctrine of "pre-emption" are well settled and have been repeated frequently by this Court. *English*, 496 U.S. at 78-79. The ultimate inquiry is whether Congress intended federal law to exclude the operation of state law. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985) ("the question whether a certain state action is pre-empted by federal law is one of congressional intent"). Congress's intent can be ascertained most directly in statutory provisions, such as Section 434 of the FRSA, that describe expressly when state regulation is pre-empted. In interpreting such provisions, the Court considers " 'the explicit statutory language and the structure and purpose of the statute.' " *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2382 (1992) (quoting *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990)).

Absent an explicit pre-emption provision, the Court will determine whether "Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby 'left no room for the States to supplement' federal law." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where, as here, there is an explicit pre-emption provision, however, " 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." *Cipollone*, 112 S. Ct. at 2618 (plurality opinion) (quoting *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.)). As Justice Scalia explained in his separate opinion in *Cipollone*, "[t]he existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines." *Id.* at 2633 (Scalia, J., concurring in part and dissenting in part).

Finally, "[i]n addition to express or implied pre-emption, a state law also is invalid to the extent that it 'actually conflicts with a . . . federal statute.' " *International Paper Co.*, 479 U.S. at 491 (citation omitted). A conflict requiring pre-emption occurs whenever it is impossible for a private party to comply with both state and federal requirements, or where state law " 'stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress.' " *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

In this case, respondent's assertions that petitioner should have provided different traffic control devices and and that travel at 30-45 miles per hour was excessive are pre-empted both by Section 434 and because they conflict with FRSA. Petitioner's pre-emption argument is very narrow. Petitioner does not seek complete immunity from tort law; it seeks merely to prevent state tort law from imposing liability upon a railroad (1) for a decision (regarding traffic control devices) that is assigned to state officials by federal law and from which petitioner is not free to depart and (2) for conduct (regarding train speed) that falls well within the limits for safety mandated by the Secretary of Transportation.

Accordingly, petitioner remains responsible at common law to pay compensatory damages for injuries caused by its failure properly to operate or maintain traffic control devices, a responsibility that the Secretary has left with the railroad. Similarly, petitioner could be liable for compensatory damages if one of its trains exceeded the federally imposed speed limit and thereby caused an injury.[9] But liability for the decision of state and local

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[9] FRSA sets forth a schedule of civil penalties for violations of the regulations. 45 U.S.C. § 438(b). These fines, which are paid to

officials to choose a particular traffic control device or for operating within the speed limit set by the Secretary is pre-empted both under the plain meaning of Section 434 of FRSA and in light of Congress's purpose in enacting FRSA.

I. STATE COMMON LAW CLAIMS FOR WRONGFUL DEATH BASED ON ALLEGED NEGLIGENCE IN PROVIDING REASONABLE TRAFFIC CONTROL SIGNALS AT A GRADE CROSSING ARE PRE-EMPTED BOTH EXPRESSLY BY SECTION 434 OF FRSA AND BECAUSE THEY CONFLICT WITH FRSA.

Congress has expressly stated its intent, in Section 434 of FRSA, to pre-empt "any law . . . relating to" railroad safety once the Secretary has adopted a rule "covering the subject matter of such state requirement." 45 U.S.C. § 434. The Secretary has adopted regulations and standards that cover the subject matter of evaluating, selecting, and paying for traffic control devices at railroad-highway grade crossings. Accordingly, any state law, including common law, that imposes a duty upon railroads that relates to this subject matter is expressly pre-empted by Section 434.

Respondent's warning-device claim is pre-empted for a second reason. Enforcement of such a common law duty would conflict with Congress's express purpose in FRSA and the Federal Highway Safety Act to replace the patchwork scheme of varying federal, state, and private responsibility with a uniform federal scheme that effectively promotes safety at grade crossings.

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the U.S. Treasury, are plainly punitive in nature and do not address the subject matter of compensating a party injured by the violation of the regulation. They therefore do not cover the subject matter of a claim for compensatory damages at common law. *See also English* v. *General Elec. Co.*, 496 U.S. 72, 87 (1990) (federal enforcement scheme "does not by itself imply pre-emption of state remedies").

A. Section 434 Pre-empts Negligence Claims Against Railroads Based On A State Common Law Duty To Select Highway Traffic Control Devices At Grade Crossings Because The Secretary's Regulations And Standards Cover That Subject Matter.

1. Section 434 Pre-empts State Tort Law.

In determining whether Section 434 pre-empts state tort law relating to railroad safety, the Court "'begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990) (quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)); see also *Morales* v *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992) (same).[10]

a. Here, the "breadth of [Section 434's] pre-emptive reach is apparent from [its] language." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983). Section 434 pre-empts "any law . . . relating to railroad safety." 45 U.S.C. § 434. On its face, this broad language encompasses state common law that would impose a duty on railroads to select appropriate traffic control devices for grade crossings.

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[10] There is some question as to whether and how the principle that pre-emption is not presumed applies where Congress, through an express pre-emption provision, has clearly manifested an intention to pre-empt state law. *Compare Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2621 (1992) ("fairly" construing statute to pre-empt some tort actions but "narrowly" construing statute to determine precisely which ones) *with Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992) (state airline advertising laws were pre-empted by an express pre-emption provision based on the "ordinary meaning of th[e] language" of the federal law); *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990). In this case, a crabbed interpretation of the term "any law" in § 434 would be inconsistent with both the sweeping language of the provision and with its dominant purpose, which is to ensure national uniformity of railway safety standards so far as practicable.

When confronted with comparable, or even somewhat narrower, language in other statutes, this Court has consistently interpreted such language to refer both to common law as well as to statutory law. At issue in *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156 (1991), for example, was a provision of the Interstate Commerce Act that exempted carriers from "the antitrust laws and from all other law, including State and municipal law." *Id.* at 1159 (quoting 49 U.S.C. § 11341(a)). The Court held that the provision encompassed state common law because the phrase " 'all other law' indicates no limitation," and because the context indicated that the term was to be given a broad reading. *Id.* at 1163-64. Similarly, in construing the express pre-emption provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), the Court held that the language "any and all State laws . . . [that] relate to any employee benefit plan" extends to state common law. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 45 (1987).

Most recently, in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Court held that the statutory phrase " 'requirement or prohibition' [imposed under state law] . . . easily encompass[es] obligations that take the form of common law rules." *Id.* at 2620 (plurality opinion); *id.* at 2634 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part). The plurality opinion recognized that "[a]t least since *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations." 112 S. Ct. at 2620. See *Erie*, 304 U.S. at 71 (law includes "the unwritten law of the State as declared by its highest court"); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) ("[w]e see no reason not to give 'laws' its natural meaning . . . , and therefore conclude that . . . [it includes] claims founded upon . . . common law as well as those of statutory origin"); *cf. Morales*, 112 S. Ct. at 2037-38 (rejecting argument that statutory phrase "any law . . . relating to" does not

encompass state laws of "general applicability"). Where Congress has chosen to pre-empt "any law," therefore, it should be understood to have pre-empted common law as well as statutes.[11]

b. The Court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97. Neither the language nor the structure and purpose of the Act provide any basis for departing from the plain meaning of Section 434.

The language of Section 434 is sweeping in all respects —far more so, for example, than the cigarette advertising statute at issue in *Cipollone*. In Section 434, for the express purpose of achieving national uniformity, Congress chose to pre-empt "any law . . . relating to" railroad safety. The phrase "any law" is surely as broad, if not broader, than "state law." And the phrase "relating to," as this Court has repeatedly held, is "conspicuous for its breadth." *FMC Corp.*, 111 S. Ct. at 407. As the Court stated just last Term, "the words thus express a broad pre-emptive purpose." *Morales*, 112 S. Ct. at 2037. In sum, Section 434 applies to any law that "has a connection with or reference to" railroad safety. *Shaw*, 463 U.S. at 97.

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[11] This Court has repeatedly pre-empted common law claims where necessary to ensure proper operation of a uniform federal scheme. *See, e.g., Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 484 (1990) (uniform federal scheme of regulation pre-empts common law because "[i]t is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same . . . conduct"); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) ("A system under which each State could, through its courts, impose . . . its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress"); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154-59 (1982); *Sperry* v. *Florida*, 373 U.S. 379, 403 (1963); *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 535 (1959).

Nor does the balance of the statute indicate any grounds for a narrowing construction. A straightforward reading is mandated by the opening sentence of Section 434, in which "Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform *to the extent practicable.*" 45 U.S.C. § 434 (emphasis added). There is nothing "impracticable" about construing Section 434 to pre-empt common law duties that overlap with national duties imposed by the Secretary. To achieve uniformity, Section 434 must be so interpreted.[12]

Moreover, the statute's careful recitation that it pre-empts "any law, rule, regulation, order, or standard" once the Secretary has adopted a "rule, regulation, order, or standard" underscores Congress's intent to pre-empt every type of state-imposed standard. Congress required only that the Secretary, by any means within the Secretary's power, provide a standard covering "the subject matter of such State requirement." *Id.* See also *id.* at § 433(b) (instructing the Secretary to use all of his authority, both under "this subchapter and pursuant to" the highway safety laws, to improve safety at grade crossings).[13]

[12] As discussed *supra*, pp. 21-22, petitioner does not take the position that FRSA pre-empts all common law claims arising out of injuries at grade crossings. FRSA is identical, in this respect, to the Federal Cigarette Labeling and Advertising Act addressed in *Cipollone*. In both statutes, Congress did not expressly refer to "common law" in either a pre-emption or a savings clause because "Congress was neither pre-empting nor saving common law as a whole—it was simply pre-empting particular common law claims, while saving others." 112 S. Ct. at 2621 n.22.

[13] In an ordinary case of delegated rulemaking authority, the issuing agency's intent is essential to a pre-emption analysis. *See Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 154 (even absent express pre-emption provision, federal agency may pre-empt state law as long as its regulation unequivocally expresses its pre-emptive intent and is within the agency's rulemaking authority).

In this case, Section 434 itself pre-empts all state law that is "covered" by a regulation or standard. The plain language of Section 434 makes the Secretary's pre-emptive intent redundant. The

The concluding term of Section 434, "such State requirement," also reinforces the same conclusion. The term is most naturally read as a shorthand reference to the longer phrase "law, rule, regulation, order, or standard" that precedes it in the sentence. As this Court recognized in *Cipollone*, "common law damages actions are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions.'" 112 S. Ct. at 2620.[14] Thus, a tort always involves "a violation of some duty owing to plaintiff.'" *Id.* at 2622 n.23 (quoting Black's Law Dictionary 1489 (6th ed. 1990)). For this reason, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 246-47 (1959). Common law duties therefore must be pre-empted if Section 434 is to achieve national uniformity in standards "to the extent practicable." The remaining question, therefore, is whether the Secretary, through a "rule, regulation, order, or standard," has "covered the subject matter" of the common law duties at issue here.

point is noteworthy because the Solicitor General, in his brief supporting certiorari in this case, stated categorically that "[i]f a lawfully promulgated agency regulation is at issue, that regulation's pre-emptive scope is similarly determined by the intent of the issuing authority." U.S. Br. 15. That statement needs qualification here. Because the Secretary clearly has broad rulemaking authority over railroad safety, he could pre-empt state law without Section 434. A requirement with respect to the Secretary's intent would render the intent of Congress embodied in Section 434 essentially superfluous. In any event, the only reasonable conclusion to draw from the Secretary's comprehensive regulatory scheme is that the Secretary intended to pre-empt tort law duties such as respondent asserts here.

[14] *See also* W. Keeton, et al., *Prosser & Keeton on the Law of Torts* 22 (5th ed. 1984) (tort law establishes "the conduct required of the actor by society for the protection of others"); Restatement (Second) of Torts § 4 (1965) (duty imposed under common law "denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability").

2. The Secretary's Rules And Standards Relieve Railroads Of Their State Common Law Duty To Select Appropriate Traffic Control Devices For Grade Crossings.

The "subject matter" of the common law rule that respondent seeks to enforce is the railroad's duty to provide reasonable warning devices (here, an automatic gate) at grade crossings. Pet. App. 24a. Under Georgia common law, CSXT would be required to "exercise reasonable or ordinary care, commensurate with the danger of the particular situation" at the Cook Street grade crossing. *Central of Ga. R.R.* v. *Markert*, 410 S.E.2d 437, 439 (Ga. Ct. App.) (quoting 74 C.J.S., Railroads, § 713, at 1308), *cert. denied*, 1991 Ga. LEXIS 839 (Ga. S. Ct. Oct. 18, 1991). The jury would decide whether additional signals or devices should have been installed in the exercise of ordinary care. *Isom* v. *Schettino*, 199 S.E.2d 89, 93 (Ga. Ct. App. 1973); see also Ga. Code Ann. § 51-1-2 (1991) (ordinary care is "that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances").

The essence of the common law system is its retrospective focus; railroads typically would identify the need for new warnings only after the accident occurred. The Secretary has replaced that system—at least insofar as the selection of appropirate traffic control devices is concerned—with a comprehensive prospective approach. See generally 23 C.F.R. Parts 630, 646, 655, 924, 1204.4 & Nos. 13, 13. In particular, the Secretary has adopted standards and regulations that (a) assign to local and state authorities the duty to evaluate crossings and select appropriate warning devices; (b) provide that railroads shall not be ordered to bear any part of the cost of installing those devices; and (c) explicitly identify the circumstances in which gates should be installed as additional protection at a particular grade crossing. These regulatory actions effectively cover the subject matter of responsibility for determining when automatic gates or other

traffic control devices are needed and therefore pre-empt the assignment through state tort law of a comparable duty to railroads.

a. The Secretary has delegated to the Federal Highway Administrator authority to promulgate regulations implementing the Secretary's responsibilities for ensuring grade crossing safety under FRSA and the Federal Highway Safety Act. See *infra* p. 36 & n.15. Chapter I of Title 23 of the Code of Federal Regulations contains the FHWA's regulations. Two subchapters contain regulations that assign responsibility for selecting appropriate traffic control devices to public authorities.

(i). Subchapter J is entitled "Highway Safety." In Part 924, entitled "Highway Safety Improvement Program," the Secretary requires each state to develop and implement "a comprehensive highway safety improvement program." 23 C.F.R. § 924.1. The program must have a "planning component" that "shall incorporate:

> (1) A process for collecting and maintaining a record of accident, traffic, and highway data . . .,
>
> . . .
>
> (3) A process for conducting engineering studies of hazardous locations . . .,
>
> (4) A process for establishing priorities for implementing highway safety improvement projects, considering:
>
> (i) The potential reduction in the number and/or severity of accidents,
>
> (ii) The cost of the projects and the resources available,
>
> (iii) The relative hazard of public railroad-highway grade crossings based on a hazard index formula,
>
> (iv) Onsite inspection of public grade crossings,
>
> (v) The potential danger to large numbers of people at public grade crossings used on a regular basis by passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials . . . ."

Id. at 924.9(a). To assist the states in setting priorities for improvements based on the information collected, the Secretary has developed both a Hazard Index Formula and detailed cost-benefit models designed to account for all of the many variables that go into a determination whether additional warning signals are needed. See DOT Handbook at 178-81; U.S. DOT, Rail-Highway Crossing Resource Allocation Procedure, User's Guide (3d ed. 1987).

The Secretary also has issued "Uniform Guidelines for State Highway Safety Programs." 23 C.F.R. Part 1204.4. These guidelines establish that state programs "should provide, as a minimum, . . . a systematic identification and tabulation of all rail-highway grade crossings and a program for the elimination of hazards and dangerous crossings," and should include a schedule to "[a]nalyze potentially hazardous locations, such as . . . railroad grade crossings and *develop appropriate countermeasures.*" 23 C.F.R. § 1204.4 Nos. 12.I.G. and 13.D.5 (emphasis added).

(ii). The Secretary has further regulated the responsibility for selecting traffic control devices at grade crossings in subchapter G, "Engineering and Traffic Devices." Subsection 646.214(b) is entitled "Grade Crossing Improvements." It states, in pertinent part, that "[a]ll traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways [MUTCD] supplemented to the extent applicable by State standards." 23 C.F.R. § 646.214(b)(1). The MUTCD, in turn, expressly assigns responsibility for selecting devices at grade crossings to local authorities, subject to state approval. Part VIII of the MUTCD, which is entitled "Traffic control systems for railroad-highway grade crossings," states:

> With due regard for safety and for the integrity of operations by highway and railroad users, the highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. *The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority.* Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD at 8A-1 (emphasis added); see also *id.* at 8D-1 ("The selection of traffic control devices at a grade crossing is *determined by public agencies* having jurisdictional responsibility at specific locations") (emphasis added). Part VIII further specifies that the decision regarding which particular traffic control device is appropriate for a particular crossing is one that requires an "engineering and traffic investigation," and that no device may be installed until approval is received from the state:

> Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made *whether any* active traffic control system is required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, *approval is required from the appropriate agency* within a given state.

Id. (emphasis added).

This assignment of responsibility to public authorities, and not private parties, is a "rule, regulation, order or standard" adopted by the Secretary. The Secretary has expressly "incorporated by reference" the MUTCD into the Code of Federal Regulations. See 23 C.F.R. § 655.601(a). The Secretary has further stated that the MUTCD "is the national standard for all traffic control devices installed on any street [or] highway" and that it "is specifically approved by the FHWA [Federal Highway Administration] for application on any highway project in which Federal-highway funds participate." *Id.* at

§ 655.603(a). Finally, the Secretary has "delegated" to the FHWA Regional Administrator "the authority to approve state MUTCDs and supplements," which "shall be in substantial conformance with the national MUTCD." *Id.* § 655.603(b)(1). These regulations leave no doubt that the Secretary has both covered the subject matter of responsibility for selecting traffic control devices at grade crossings and ensured that that regulation will be nationally and uniformly applied.

(iii). The Secretary's regulations thus assign to state and local transportation authorities, and not to railroads, the task of setting priorities for improvements at all public railroad grade crossings and selecting appropriate traffic control devices. The regulations implement the judgment that the choice of warning signals is a matter of public policy that must take into account factors, such as the use of crossings by local school or transit buses, that public authorities are uniquely well-suited to know about and monitor. For example, if a new school were being built that would require a number of buses to cross the railroad tracks two times each day, then the local jurisdictions would know that the crossing would need to be re-evaluated to determine whether additional traffic control protection was required. Conversely, while a railroad might be inclined to urge improvements in warning devices after a train accident involving a truck moving materials from a local manufacturer, a local jurisdiction would know if the company were planning to relocate, and thus if resources would be better spent upgrading a different crossing.

Thus, the Secretary's regulations and standards cover the subject matter of selecting appropriate grade crossing devices. It is inconceivable that the Secretary, having required states to engage in a comprehensive evaluation of all railroad grade crossings, would expect railroads to duplicate that effort in order to meet common law obligations. The railroads are not in as good a position as a centralized federal agency, let alone local and state authorities, to conduct a crossing-by-crossing survey, examine local conditions, and make public policy choices about appropriate levels of warning devices.

b. The Secretary's assignment of responsibility to public authorities for the selection of appropriate safety improvements at grade crossings is underscored by the Secretary's regulations concerning the allocation of costs for selecting and installing (as opposed to operating and maintaining) traffic control devices. These regulations appear in Part 646 of Title 23, subpart B, which is entitled "Railroad-Highway Projects." There, the Secretary has issued detailed regulations implementing Congress's directive to classify a percentage of the costs (not to exceed 10 per centum) "of projects involved in the elimination of hazards of railway-highway crossings" to be paid by the railroad as a reflection of "the net benefit to the railroad" of the project. 23 U.S.C. § 130(b). See 23 C.F.R. § 646.210; see also *id.* at 646.216(d)(2)(iv); 646.218; 646.220(b)(1); *cf.* 23 C.F.R. § 140.900.

In general, the Secretary has determined that "[p]rojects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. § 646.210(b)(1); see also *id.* at § 646.210(b)(2); § 646.216(d)(2)(iv). The only exceptions are where "the railroad has a specific contractual obligation with the State" to share in the costs of reconstructing an existing grade separation (*id.*), or where the project involves "the elimination of existing grade crossings at which active warning devices are in place or *ordered to be installed by a State regulatory agency.*" *Id.* at 646.210(b)(3) (emphasis added).

These regulations also effectively eliminate the railroads' former duty to select appropriate warning devices. By covering the subject matter of which parties should pay for the installation of improved warning devices at grade crossings, and by determining that states may not order railroads to pay, the Secretary has effectively preempted any state law that would place a duty on railroads to pay for such improvements. Indeed, the finding

that improvements at grade crossings have "no ascertainable net benefit" to railroads completely undermines any argument that they have a continuing duty to make such improvements. If that common law duty remained, then the use of federal money to satisfy that obligation would directly and significantly benefit the railroads.

c. Because the claim in this case is that a railroad should have installed a gate at the crossing in question, yet another of the Secretary's regulations is directly relevant. As discussed above, subsection 646.214(b) initially establishes that all traffic control devices must comply with the MUTCD. The MUTCD sets forth the design standards that all devices must meet, but does not indicate when automatic gates are required at a particular grade crossing. That question is specifically covered in subsection 646.214(b)(3). Entitled "Adequate warning devices," this subsection provides that "the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist." 23 C.F.R. § 646.214(b)(3)(i). Examples of relevant conditions include "a combination of high speeds and moderately high volumes of highway and railroad traffic, . . . substantial numbers of school buses, . . . trucks carrying hazardous materials," or when "[a] diagnostic team recommends them." *Id.* at 646.214(b)(3)(i)(D), (E), (F). The regulation further provides that "[the] FHWA may find that the above requirements are not applicable" where "a diagnostic team justifies that gates are not appropriate." *Id.* at 646.214(b)(3)(ii).

Nothing could demonstrate more concretely that the Secretary has "covered the subject matter" of a particular state law than this regulation. By identifying the conditions that require the installation of a warning gate, the Secretary has covered the subject matter that might otherwise be addressed through state tort law by imposing a duty to install a gate at a particular crossing when "ordinary care" so required.

d. The issue of who has the duty to evaluate crossings and select and pay for traffic control devices is

starkly presented by the facts of this case. Respondent's primary argument below was that petitioner had the duty of care, and that an automatic gate should have been installed at Cook Street because such a gate allegedly would have prevented Mr. Easterwood from traveling onto the tracks at the time the CSXT train arrived.

CSXT, however, never made the decision not to install a gate. As envisioned by the Secretary's regulations, it was the State of Georgia, pursuant to its federally mandated Highway Safety Improvement Program, that examined the Cook Street crossing and that initially proposed that a gate be installed. It was not CSXT that objected to this proposal. City officials refused to approve the upgrade because it required construction of a traffic island that the City believed would create a traffic hazard, particularly for trucks, given the nearby highway intersection. Lacking city approval, state officials, pursuant to their federal authority, decided to keep the flashing lights in place and upgrade only the train-detection circuitry. See *supra* pp. 13-14.

While petitioner could have objected to state officials about the decision made by the City, CSXT had no authority to do anything other than comply with the State's decision to defer to the City and focus on other grade crossings within the state. See MUTCD 8D-1 (requiring state approval before installation of any warning device); *Hatfield* v. *Burlington N. R.R.*, 958 F.2d 320, 323 (10th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3860 (U.S. June 8, 1992) (No. 91-1977) (holding that MUTCD "effectively prohibits a railroad from acting on its own to select and install a safety device"). Under these circumstances, federal law plainly covers the subject matter to which state common law relates, namely, the imposition of a duty to select and install a gate at the Cook Street crossing in Cartersville.

3. It Is Irrelevant To Pre-emption Under Section 434 Whether The Secretary's Railroad Safety Standards Were Adopted Pursuant To FRSA Or To Some Other Statute.

The court of appeals did not quarrel with any of the principles outlined above concerning Section 434. Instead, the court of appeals held that Section 434 of FRSA is inapplicable to state law relating to grade crossings because the Secretary's regulations and standards covering grade crossings were promulgated pursuant to the Secretary's authority over highway safety rather than over rail safety. Pet. App. 10a-11a.

The court's analysis is flawed both factually and legally. Factually, the Secretary's standards are based as much on FRSA as on any other source of regulatory authority. Parts 646, 655, and 1204.4 were promulgated by the Secretary through the Federal Highway Administration pursuant to *both* federal highway legislation *and* Section 204 of FRSA (45 U.S.C. § 433(b)).[15] See 23 C.F.R. § 646.2$2 (Statement of Authority referencing 49 C.F.R. § 1.48), Part 655 (same), and Part 1204.4 (same). Under Section 1.48, the Secretary delegated to the FHWA the authority to administer numerous sections of Title 23 and to "[e]*xercise the authority vested in the Secretary by section 204(b) of the Federal Railroad Safety Act of 1970* (84 Stat. 972, 45 U.S.C. § 433(b)) with respect to the laws administered by the [FHWA] pertaining to highway safety and highway construction." 49 C.F.R. § 1.48(o) (emphasis added).

The Secretary's express acknowledgement that he was acting pursuant to FRSA, though noteworthy, is ultimately unnecessary as a legal matter given the plain language of Section 434. Section 434 does not limit its pre-emptive scope to regulations adopted by the Secretary

[15] The Secretary heads the Department of Transportation, which comprises several agencies, including the FRA and the FHWA. *See* 49 U.S.C.A. §§ 102-104 (1991 Pamphlet). The Secretary has delegated various authority to both agencies. *See generally* 49 C.F.R. §§ 1.48 and 1.49.

pursuant to FRSA. The statute allows state law relating to railroad safety to be enforced only "until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. Section 434 thus pre-empts state law upon the Secretary's adoption of a rule without any limitation on the source of the Secretary's authority as long as it involves railroad safety. See *CSX Transp., Inc.* v. *Public Utils. Comm'n*, 901 F.2d 497, 501 (6th Cir. 1990) ("FRSA pre-emption relates to *all* rules and regulations regarding railroad safety *promulgated by the Secretary*, whether or not such regulations are promulgated by the [FRA]") (emphasis in original), *cert. denied*, 111 S. Ct. 781 (1991).

The Eleventh Circuit's analysis also is inconsistent with the immediately preceding section of FRSA. There, Congress authorized the Secretary to use his authority not only under FRSA but also under the highway acts to develop and implement solutions to the grade crossing problem. Specifically, Congress stated that "the Secretary shall, insofar as practicable, under the authority provided by this subchapter *and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction*, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem." 45 U.S.C. § 433(b) (emphasis added). The plain language of Sections 433(b) and 434, not discussed by the court of appeals, demonstrate that the court's formalistic distinction between regulations promulgated pursuant to highway versus railroad authority is untenable.

4. The Grade Crossing Claim Is Pre-Empted Under Any Theory Adopted By Other Federal Courts Of Appeals That Have Applied Section 434.

Under the plain language of section 434, the Secretary's decisions to require States to select appropriate warning devices through their Highway Safety Improvement Programs, and to adopt the MUTCD as a national standard,

pre-empted any common law obligation on the part of railroads to continue to assume that responsibility. This is the unambiguous holding of the most recent appellate court outside the Eleventh Circuit to have interpreted Section 434. See *Hatfield*, 958 F.2d at 342.[16]

Another appellate court, however, has suggested that pre-emption of state law does not occur until the local agency has actually made a judgment "on the adequacy of the warning devices at [a particular] crossing." *Marshall* v. *Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983) (Kennedy, J.). In the Ninth Circuit's view, the Secretary cannot be said to have "covered" the "subject matter" of traffic control devices at a grade crossing until a local authority has specifically ruled on that crossing.

The Ninth Circuit's approach to the meaning of "subject matter" is unduly narrow. There is no evidence that Congress ever intended the Secretary directly to select warning devices for each of the nation's public crossings. Rather, Congress directed the Secretary to coordinate a uniform regulatory scheme. When the Secretary assigned to state and local jurisdictions the responsibility for selecting appropriate warning devices, he plainly regulated the "subject matter" of responsibility for such selection as surely as the common law did when it imposed the same responsibility upon railroads. *Hatfield*, 958 F.2d at 324.

The Ninth Circuit's interpretation is also inconsistent with Congress's decision to exclude much of the evidence regarding local decisionmaking in damages actions. See

[16] In *Mahony* v. *CSX Transp., Inc.*, 966 F.2d 644 (11th Cir. 1992), an Eleventh Circuit panel held that it was bound by *Easterwood* to reverse a district court's finding that FRSA pre-empted a common law claim for railroad negligence in selecting warning devices at grade crossings. The other courts of appeals to have addressed comparable tort claims are the Eighth Circuit in *Karl* v. *Burlington N. R.R.*, 880 F.2d 68, 75-76 (1989), which did not even discuss express pre emption under Section 434, and the Eleventh Circuit in this case and in *Mahony*. *See also* Pet. 16 (citing lower court cases finding warning-device claim pre-empted).

23 U.S.C. § 409 (federal and state courts may not admit into evidence any "reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings . . . in any action for damages"). Pre-emption under Section 434 should not be made to turn on evidence that Congress has deemed inadmissible. More broadly, the Ninth Circuit's approach undermines the goal of national uniformity and effectiveness that Congress expressly set forth in Section 434. The Ninth Circuit's approach effectively requires railroads to duplicate the states' efforts in evaluating grade crossings, thereby squandering scarce resources that Congress intended to deploy in a coordinated and productive way. And by holding out the possibility of independent railroad action, the Ninth Circuit's approach creates a disincentive for states and local authorities to act promptly to survey grade crossings and order improvements where warranted.

In this case, however, the undisputed record shows that respondent's claim is pre-empted even under the Ninth Circuit's test. In *Marshall*, the court refused to find pre-emption because local authorities had yet to decide if additional warning devices were necessary. 720 F.2d at 1154. Here, by contrast, the court of appeals assumed that local authorities had assessed the need for additional warning devices, had decided that they were needed, but had failed to implement the decision "due to various financial constraints and logistical problems." Pet. App. 12a. See also *supra*, pp. 13-14. Although the panel characterized this action by the state as "a failure . . . to act" (Pet. App. 12a), it is clear that the Georgia DOT made precisely the kind of priority-based determination whether or not to add additional warnings to this grade crossing that is mandated by the federal regulatory scheme. *E.g.*, 23 C.F.R. § 924.9(a)(ii) (requiring consideration of "cost of the projects and the resources available"). In these circumstances, even under the Ninth Circuit's test, a common law claim against the railroad is pre-empted.

B. Enforcement Of A Common Law Duty For Railroads To Select And Install Appropriate Traffic Control Devices Conflicts With FRSA.

Imposing on railroads a duty to select and install appropriate warning signals at grade crossings also conflicts with the federal approach that Congress mandated in FRSA and that the Secretary's regulations have implemented.[17] Under the Federal statutes and the Secretary's implementation of that program, it is the public authority that is responsible for selecting the appropriate traffic control devices, subject to the approval of the appropriate state agency. 23 C.F.R. § 655.601(a), 924.9; MUTCD 8A-1, 8D-1. That responsibility cannot also be placed upon the railroad without frustrating the achievement of the "full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

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[17] Petitioner does not interpret the plurality opinion in *Cipollone* to establish a new rule that the existence of an express pre-emption provision in a particular statute precludes all inquiry into conflicts pre-emption. *See Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) (plurality opinion) ("the pre-emptive scope of the [statute] is governed entirely by the express language" of that provision); *see also id.* at 2625 (Blackmun, J., joined by Kennedy and Souter, J.J., concurring in part and dissenting in part). Rather, the plurality opinion held only that an inquiry into implied field pre-emption is inappropriate. *See* 112 S. Ct. at 2618 (express pre-emption provision means " 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation") (citation omitted).

This interpretation is appropriate for two reasons. First, any broader reading would conflict with *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), where this Court squarely held that a state law not pre-empted under an express pre-emption provision was nevertheless invalid because it stood " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* at 540-41 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1942)); see also *International Paper Co.* v. *Ouellette*, 479 U.S. 781 (1987). Second, the plurality opinion relied (112 S. Ct. at 2618) on *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.), which considered whether a state law conflicted with a federal statute that had an express pre-emption provision.

Congress left no doubt that its objective in enacting FRSA was to replace the fragmented approach toward responsibility for grade-crossing safety with a nationally coordinated, uniform approach. *E.g.*, 45 U.S.C. §§ 433(b), 434; House Report at 4109 ("The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"); 116 Cong. Rec. 27613 (1970) (Statement of Rep. Pickle) (FRSA will "eliminat[e] the possibility of patchwork regulations and substitut[e] instead a clear-cut national program"). The Secretary's regulations implement that goal, in significant measure, by assigning to public authorities the responsibility for evaluating grade crossings and selecting appropriate warning devices, and by setting out in detail the factors those public authorities should consider in setting priorities and in deciding when particular warning devices are needed. See 23 C.F.R. §§ 646.214, 924.9, 1204.4 No. 13.D.

This assignment of responsibility is appropriate given the many elements, most of which include information available to local authorities and not to railroads, that go into the "engineering and traffic investigation" necessary to set priorities and select proper traffic control signals. MUTCD 8D-1. For each crossing, the decisionmaker must consider, among other things, the volume of traffic at the crossing, whether school buses or trucks carrying hazardous materials use the crossing, and what impact a change in signals will have on highway traffic.[18] 23 C.F.R. § 924.9(a). Local authorities should make these judgments, both because they are in the best position to

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[18] More signs and warnings do not necessarily increase safety at every grade crossing. As the Secretary explained in his comprehensive 1971-72 Reports to Congress, stopping highway traffic unnecessarily "increases the danger for other vehicles using the highway and has resulted in vehicle-vehicle collisions when such vehicles are decelerating to stop, are stopped, and also when such vehicles attempt to re-enter the traffic stream." DOT Report Part I at 75; *see* MUTCD at 8B-7, 8D-1.

gather and be alert to the relevant information, and because the final decision may involve trade-offs that a public body, considering public safety, is uniquely suited to make.

Imposing the duty to make these decisions simultaneously on public authorities and on railroads creates significant conflicts and undermines the achievement of a uniform, nationally coordinated scheme of highway-rail safety. For example, in the Secretary's scheme, states are expressly prohibited from assessing to railroads any portion of the cost of installing improved warning devices at a railroad crossing. *Id.* at § 646.210(b)(1). Yet, under the common law, states can force railroads either to select and pay for improvements in warning devices or to pay the penalty of compensatory damages to parties who are injured at the crossing. "The inevitable result" of allowing states to impose such an obligation on railroads is to permit states to "do indirectly what they could not do directly"—force railroads to pay for the cost of installing new traffic control devices at grade crossings. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 495 (1987). Here, as in *Ouellette*, common law must be pre-empted to avoid such a conflict.

Similarly, in the Secretary's scheme, railroads are prohibited from installing a traffic control device without first obtaining the approval of the state. MUTCD 8D-1; 23 C.F.R. § 646.214(b)(1). Yet, under the common law, a jury, not the state highway authority, determines whether "the danger" posed at a crossing requires installation of additional warning devices and holds railroads accountable for a decision that—by operation of federal law—was not the railroad's to make. Such conflicting obligations are intolerable under the Supremacy Clause. *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959) (common law libel claim pre-empted where federal law prohibited broadcaster from deleting libelous statements from political advertisements).

This case aptly illustrates these conflicts. Here, City authorities refused to accept the State's initial recommendation to install a gate because they feared an adverse impact on highway traffic. See *supra* pp. 13-14. This weighing of the competing benefits and burdens of adding additional traffic controls is precisely the judgment that the Secretary has directed public authorities to make. To subject CSXT to a negligence action for failing to pay to install a warning device that (a) the state could not directly require CSXT to pay for, and (b) CSXT is barred from installing on its own initiative, conflicts with the uniform, nationally coordinated approach to crossing safety that Congress intended to achieve.

II. STATE COMMON LAW CLAIMS FOR WRONGFUL DEATH BASED ON ALLEGED NEGLIGENCE IN OPERATING A TRAIN AT AN UNREASONABLY HIGH SPEED ARE ALSO PRE-EMPTED BOTH EXPRESSLY BY SECTION 434 OF FRSA AND BECAUSE THEY CONFLICT WITH FRSA.

Respondent bases her claim for wrongful death on a second theory, that petitioner violated its common law duty to operate its train at a "moderate and safe rate of speed" when traveling through the Cook Street grade crossing. *Central of Ga. R.R.* v. *Markert*, 410 S.E.2d 437, 438 (Ga. Ct App.) (citing *Gay* v. *Sylvania Cent. R.R.*, 53 S.E.2d 713, 717 (Ga. Ct. App 1949)), *cert. denied*, 1991 Ga. LEXIS 839 (Ga. S. Ct. Oct. 18, 1991); see also *Atlantic Coast R.R.* v. *Grimes*, 109 S.E.2d 890, 893 (Ga. Ct. App. 1959) (railroad "must exercise ordinary care" in controlling train speed at crossings within city limits). Section 434 pre-empts this claim as well. Although the issue is presented separately, it is inextricably related to the basic issue of grade crossing safety. For that reason, the Secretary not only has adopted comprehensive train speed regulations that pre-empt this claim, but also has specifically covered the subject matter of the hazard to motorists posed by train speed at grade crossings. Even apart from Section 434, failure to pre-empt common law

duties with regard to train speed would frustrate Congress's and the Secretary's objectives to achieve a uniform effective, and efficient system of rail transportation as well as to ensure crossing safety.

A. The Secretary Has Covered The Subject Matter Of The Appropriate Speed At Which Trains May Travel Through Grade Crossings.

The court of appeals correctly held that the Secretary's regulations had covered the subject matter of the speed at which trains may travel, including the appropriate speed for grade crossings. Pet. App. 7a-9a. As the court of appeals observed, the Secretary has set forth comprehensive regulations that classify track into six categories and set "maximum operating speeds" for every class of track. 49 C.F.R. § 213.9 and App. A. Because the track at this grade crossing is class 4, the maximum allowable operating speed for a freight train is 60 mph. *Id.*

In setting its speed regulations, the Secretary plainly took into account safety concerns. One such concern was to minimize the possibility of derailments, one of the leading causes of train accidents prior to 1970. Task Force Report at 4126. But the Secretary's speed regulations address additional safety concerns as well. For example, the Secretary has addressed the safety hazard that is posed when a train travels too slowly along a given stretch of track. "When a train is moving on the main track at less than one-half the maximum authorized speed," a crew member must alert following trains to the danger "by dropping off single lighted fusees at intervals that do not exceed the burning time of the fusee." 49 C.F.R. § 218.37(a)(1)(i). The Secretary has imposed particular limits and controls for moving defective cars for repair (§ 215.9), for certain segments of "excepted track" (§ 213.4), for curves (§ 213.57), and for segments of damaged track (§ 213.137). Petitions to exceed the maximum allowable operating speed may be submitted to the Federal Railroad Administrator, and must provide information on such issues as "the performance characteristics of the track, signaling, and grade crossing protection." *Id.* at § 213.9(c); see also *id.* at § 201.4 (promising "the just, speedy, and inexpensive determination of all issues raised with respect to any proposal to increase speeds").

Even assuming, as the court of appeals did, that this is all that the Secretary had promulgated with regard to train speed, such regulation would be sufficient, without more, to pre-empt state duties concerning train speed. Pet. App. 7a-9a. As this Court held this past Term, pre-emption "turns not on whether federal and state laws 'are aimed at distinct and different evils'" but on whether they "'operate upon the same object.'" *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2387 (1992) (citation omitted); see, *e.g.*, *Perez* v. *Campbell*, 402 U.S. 637, 651-52 (1971); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963) (same).

But the Secretary's regulations do in fact address the precise issue of the hazard posed by train speed at grade crossings that would otherwise be the subject of a common law duty. Rather than minimize the need for grade crossing protection by lowering train speeds, the Secretary has sought to adjust grade crossing warnings to ensure adequate protection for the speed at which the trains will be traveling. As a general matter, for all grade crossings, the Secretary has specifically required that active warning signals be adjusted to give no less than 20 seconds of warning regardless of the speed of the train:

> On tracks where trains operate at speeds of 20 mph or higher, circuits controlling automatic flashing light signals shall provide for a minimum operation of 20 seconds before arrival of any train on such track.
>
> . . . .
>
> Where the speeds of different trains on a given track vary considerably under normal operation, special devices or circuits should be installed to provide reasonably uniform notice in advance of all train movements over the crossing.

MUTCD 8C-7. At the same time, the Secretary has recognized that "care must also be taken to ensure that the warning time is not excessive," because the motorist "may attempt to cross the tracks despite the operation of the flashing light signals—and even lowered gates, if present." DOT Study 4-6.[19]

Furthermore, the Secretary has established that the expected speed of trains is an important factor to be considered in determining whether to install an active warning device and, if so, what type of device is appropriate. Thus, the Secretary has specifically required states to install "gates with flashing light signals" where the crossing involves "high speed train operation combined with limited sight distance" or a "combination of high speeds and moderately high volumes of highway and railroad traffic." 23 C.F.R. §§ 646.214(b)(3)(i)(C), (D).[20] The Secretary's hazard index formula, which assists state and local authorities in ranking crossings in need of improvements and determining what additional protection is needed, specifically takes into account the expected train speed through the crossing. DOT Handbook at 70; see 23 C.F.R. § 924.9(a)(4)(iii) (requiring use of a hazard-index formula to set priorities). And the Secretary will not grant a petition to exceed the maximum operating speed without first considering, among other factors, "grade crossing protection." 49 C.F.R. § 213.9(c).

These regulations establish that the Secretary has covered the subject matter at issue: the hazard posed by the speed at which trains travel through grade crossings. The Secretary has chosen to regulate subject matter by adopting overall maximum speed limits and then

[19] *See also* DOT Study 4-20 ("More than half of all rail-highway crossing accidents are the result of a motorist driving around lowered gates or proceeding through flashing red lights without stopping"); DOT Handbook 41, 126.

[20] The Secretary's guidance for the placement of warning signs beside the road also expressly takes into account expected train speed. DOT Handbook 131-35.

setting uniform requirements for warning signals that ensure that adequate warning is provided to motorists as long as the train travels within federal speed limits. Having covered that subject matter, the Secretary's regulations pre-empt a state common law duty to proceed at an unspecified, jury-determined "reasonable" speed.[21]

All courts that previously have considered the issue have found that the Secretary's speed regulations pre-empt slower speeds mandated by state common law or municipal ordinance.[22] Were this Court to hold that the Secretary's regulation of speed does not cover the subject matter of maximum safe speeds, then potentially every

[21] Respondent's suggestion (Cross-Pet. 7-9) that the common law duty to reduce train speed at grade crossings is saved from pre-emption by the "local hazard" exception to section 434 is without merit. As the court of appeals correctly held, this exception "is irrelevant" to this case. Pet. App. 6a n.3. The exception, as its language indicates, was merely intended to allow a state to "take charge of purely local hazards." 116 Cong. Rec. 26712 (1970) (statement of Rep. Springer). By definition, a common law duty is not specific to a particular location. It is precisely the kind of "[s]tatewide standard[] superimposed on national standards covering the same subject matter" that Congress expressly intended to pre-empt. House Report at 4117. And even if the standard were not statewide, its imposition is "incompatible" with federal law and would plainly create "an undue burden on interstate commerce." *See infra* Part II.B.

[22] *See, e.g., Smith* v. *Norfolk & W. Ry.*, 776 F. Supp. 1335, 1342 (N.D. Ind. 1991); *Johnson* v. *Southern Ry.*, 654 F. Supp. 121, 123 (W.D.N.C. 1987); *Sisk* v. *National R.R. Passenger Corp.*, 647 F. Supp. 861, 865 (D. Kan. 1986); *Central of Ga. R.R.* v. *Market*, 410 S.E. 2d 437 (Ga. Ct. App. 1991), *cert. denied*, 1991 Ga. LEXIS 839 (Ga. S. Ct. Oct. 18, 1991); *Santini* v. *Consolidated Rail Corp.*, 505 N.E. 2d 832, 838 n.4 (Ind. Ct. App. 1987). For cases involving only a municipal ordinance, *see, e.g., CSX Transp., Inc.* v. *City of Thorsby*, 741 F. Supp. 889, 891 (M.D. Ala. 1990); *Grand Trunk W. R.R.* v. *Town of Merrillville*, 738 F. Supp. 1205, 1207 (N.D. Ind. 1989); *City of Covington* v. *Chesapeake & Ohio Ry.*, 708 F. Supp. 806, 808 (E.D. Ky. 1989); *CSX Transp., Inc.* v. *City of Tullahoma*, 705 F. Supp. 385, 387 (E.D. Tenn. 1988); *Southern Pac. Transp. Co.* v. *Town of Baldwin*, 685 F. Supp. 601, 603 (W.D. La. 1987); *Chesapeake & Ohio Ry.* v. *City of Bridgman*, 669 F. Supp. 823, 826 (W.D Mich. 1987).

community through which a train passes could enact, or enforce through the common law, its own restrictive speed limit. This significant interference with uniform regulation of safety is completely inconsistent with Congress's expressed intention in Section 434 and therefore should be rejected. All state law efforts to regulate the maximum allowable speed—whether by tort liability or by posting speed limits—are pre-empted by Section 434 and the Secretary's regulations.

B. Enforcement Of A Common Law Duty For Railroads To Reduce Train Speed At Grade Crossings Also Would Conflict With FRSA.

Superficially, as the court of appeals acknowledged, a federal maximum operating speed is not necessarily incompatible with a state law duty to travel no faster than is safe. Pet. App. 9a. But the Secretary has addressed the issue of train speed at grade crossings not simply by setting maximum operating speeds, but by having warning devices selected on the basis of the expected train speed. This approach ensures that motorists receive appropriate and consistent warnings of a train's arrival. A common law duty based on different assumptions about efficiency and safety in train travel would force trains to travel substantially slower through grade crossings than they otherwise would. Imposition of such a duty would frustrate the Secretary's approach to the question of train speed.

The Secretary's decision to address the issue of train speed through regulation of the warning devices rather than through lowering speed limits reflects the fact that such limits would be neither an effective nor an efficient way to increase safety. Such limits are not effective because they fail to take into account the fundamental difference between a highway intersection and a railroad grade crossing. The average train is 71 cars (over ½ mile) long and carries 2,644 tons of freight for an average distance of 688 miles. DOT Study 2-1. "Unlike motor vehicles, trains cannot be quickly stopped nor can an

engineer take evasive action to avoid vehicle-train collisions at grade crossings." DOT Report Part I, at 77. Indeed,

> A very long distance is required to stop a train. The nature of conventional train braking systems, the limitations imposed by train dynamics, and the predominance of lengthy freight trains combine to make even an emergency brake application a slow and hazardous process, requiring initiation one-half to two miles in advance of the obstacle. Thus, most cases of stalled vehicles are such that there is usually no chance of stopping the train in time to avoid a collision.

Id. at 66. Thus, in 1990, almost 23 percent of all crossing accidents involved train speeds of less than 10 miles per hour, and well over half involved train speeds of less than 30 miles per hour. DOT Crossing Inventory at 20. Having trains traverse crossings at an extremely slow speed itself creates hazards—such as the impatient driver who attempts to cross the track just before the train arrives to avoid a long delay, or the emergency vehicle that is delayed in responding to a life-threatening situation. *See supra* note 19; DOT Handbook 142 (noting that increasing train speeds may increase safety); Brief for Association of American Railroads at pp. 20-26.

Reducing train speed also is not an efficient solution. In 1983, there were "approximately 2.4 crossings per railroad line mile." DOT Handbook 3; see also DOT Study at 2-1, 2-4. Train service simply cannot be provided efficiently if states and localities can impose slow speed limits at each of the more than 1,000 crossings that a freight train passes through on an average line haul. *Id.* As the Secretary recognized in 1972, "[t]he operating costs of decelerating trains to conform to these [local] speed restrictions and then accelerating to maintain the desired operating speed outside of these areas imposes a very significant cost upon railroads. This cost appears to be in the order of $75 to $100 million annually." DOT Report Part II at 20. The added delay also "has a detri-

mental effect on smooth and efficient traffic flow" on crossings and adjacent roads. *Id.* at 19; see DOT Study 6-1 (need to minimize cost of delay).

Allowing states to impose a general common law duty to traverse grade crossings at a "safe speed" is plainly inconsistent with the Secretary's approach. The rationale behind such a duty is based on an analogy to highway travel that is fundamentally flawed; trains, except at the slowest speeds, cannot brake in time to avoid collisions with objects in their line of sight, and can never swerve to avoid them. The Secretary's approach recognizes that slowing trains down will not improve crossing safety, and that trains must be able to travel at speeds consistent with the federal requirements if rail freight and passenger service is to remain efficient. Imposing a common law duty that would permit a jury, after the fact, to decide that a train was moving too fast, would conflict with Congress's purpose to achieve a uniform federal approach to railroad safety. Such a duty therefore is pre-empted.

CONCLUSION

The judgment in No. 91-790 should be reversed and the judgment in No. 91-1206 should be affirmed.

Respectfully submitted,

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